IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No.

HOSKYN & CO., INC., *et al.*,
Petitioners,

—against—

SILVER LINE, LTD.,
Respondent.

INTERNATIONAL STANDARD ELECTRIC CORP., *et al.*,
Petitioners,

—against—

SILVER LINE, LTD.,
Respondent.

CHINA GENERAL EDISON CO., INC.,
Petitioner,

—against—

SILVER LINE, LTD.,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI.

Jurisdiction.

These are suits within the Admiralty and Maritime jurisdiction of the United States and of this Honorable Court. Jurisdiction of this Court is invoked under Article III, Sec. 2, of the Constitution of the United

States of America and under Section 240 of the Judicial Code as amended by the Act of Feb. 13, 1925, 43 Stat. 938 (28 U. S. C. Sec. 347).

Statement.

The facts stated in the petition, based on the opinions below, will not be repeated here. However, the opinion of the Circuit Court of Appeals discloses that it misconceived one of the basic technical principles which is involved in the issues presented by this petition and in the appeal below; and a principle which is not in controversy between the parties.

In discussing the petitioners' submission that the fire resulted from the fracture of a fuel oil pipe on the top of the #2 auxiliary engine, through which the oil was pumped at a pressure of 3,500 lbs., the court said (R. 1374):

> "If this did happen fuel oil might have been sprayed onto the exhaust pipes, which were normally at a temperature higher than the flash point of the fuel oil, or onto the cylinder head whose temperature might also have been above the flash point of the fuel oil. If the oil had been so sprayed, a fire, of course, would have been the result."

It will be noted that the court assumed that if oil was brought to its flash point it would automatically burst into flames; and that the normal operating heat of the exhaust pipes and cylinder heads of the #2 engine of the "Silvercypress" would heat to its flash point loose fuel oil coming in contact with them. This is a misconception of recognized engineering definitions and principles.

The "flash point" of oil is the temperature at which it will give off an ignitible vapor which, however, will merely flash if brought in contact with an igniting agency but will not burn after the agency is withdrawn (Resp. experts, R. 736-737, 471-472, 515-516).

The "fire point" is the temperature at which the oil will give off a vapor which is not only ignitible, if brought in contact with an igniting agency, but the oil will continue to burn after this agency is withdrawn (Resp. experts, R. 737-738, 471, 516).

The "ignition temperature" is the temperature which the igniting agency must have in order to ignite the vapor (Resp. experts, R. 736, 738, 516, 582-583).

It is common ground that while the normal operating temperature of the exhaust pipes, exhaust manifold and cylinder heads of such an engine as the #2 auxiliary engine of the "Silvercypress" might have heated leaking fuel oil to both its flash point and fire point (of not more than 250°—R. 737, 472), the vapor given off at these temperatures must have been subjected to a temperature of nearly 950° to become actually ignited; and that no part of the engine under normal operating conditions would have a temperature which could ignite the vapor (Resp. experts, R. 736-738, 471-472, 516, 582-583).

The misconception of the Circuit Court of Appeals was brought to its attention by a "Petition for Rehearing or, in the Alternative, for Modification of the Opinion" (R. 1376), so that the opinion which this Court was to be asked to review, might more clearly present the issues involved. The Circuit Court of Appeals denied the petition for a rehearing and ignored the petition for modification of the opinion (R. 1380-1384).

As it is common ground that, whatever may have been the source of the loose fuel oil around the #2 engine, its ignition must have resulted from some abnormal con-

dition of that engine, it is important to consider the findings below concerning possible igniting agencies.

The Circuit Court of Appeals found that the timing apparatus of the #2 engine was defective as the result of respondent's neglect (R. 1374); that defective timing would result in "a decrease in power, excessive vibration *and overheating*" (R. 1373); and that it made the #2 engine "more apt to vibrate, *to get overheated*" (R. 1374). It commented that petitioners' expert testimony was to the effect that (R. 1374):

> "If the timing was faulty enough and the engine ran long enough while in that condition, not only might it have become excessively hot but the vibration might have caused a leak in the fuel feed pipe or its connections through which the fuel under 3,500 pounds pressure was flowed into a cylinder through the intake valve."

The court said (R. 1374):

> "If, therefore, the libellants could prove that the fire was started as a result of faulty timing due to the owner's neglect, the Fire Statute would be no defense to this action."
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> * * *
>
> "But there was no evidence that the faulty timing did in fact overheat the engine just before the fire or that there was vibration which in fact caused a leak in a fuel pipe in the manner described."

The Circuit Court of Appeals pointed out that on the previous voyage of the "Silvercypress" there had been a fire on one of the auxiliary engines (R. 1370-1371). The District Court found that that fire resulted from the fracture of a by-pass valve connected to the fuel oil line leading oil to the No. 4 cylinder of the No. 4 engine; and

ignition of the leaking oil through contact with an "overheated" exhaust manifold (R. 1310). When that fire broke out the timing appartus of the No. 4 engine was defective (R. 1311; Ex. 4-17, R. 1129, offered in evidence, R. 40). Respondent's witness, the second engineer of the vessel, testified that when that fire broke out, one of the manifold branches was red hot (R. 274).

The Circuit Court of Appeals said that if the fire which destroyed petitioners' cargo resulted from the fracture of a fuel oil line on the top of the No. 2 engine and ignition of the leaking oil because of the overheated condition of that engine, respondent would be liable (R. 1371, 1374). The District Court held the same view (R. 1310, 1331).

The respondent sought to establish that the loose fuel oil was ignited by sparks from an open emergency valve which, it urged, was caused to lift because one of the cylinders of the engine became overloaded by reason of the assumed pouring down of fuel oil on the top of the engine from the assumed fracture of the main fuel oil supply pipe. It has been pointed out in the petition (at pp. 9, 11), that there is no evidence that oil reached the engine from the supply pipe, or that that pipe ever fractured, or, indeed, that its condition presented the danger of fracture.

The petitioners have stated (petition, p. 11), in discussing the respondent's theory that fracture of the main fuel supply pipe caused loose fuel oil to pour onto the #2 engine and become ignited, that the District Court commented that one of the respondent's witnesses was standing immediately under this pipe when the fire broke out. That witness testified that not a drop of oil fell on him (R. 952).

The other engineer present testified that he was also under the main supply pipe when the fire broke out and

that no oil fell on him (R. 890-891). The District Court quoted excerpts from this engineer's reports in which he explicitly asserted that there was no fracture of the main supply pipe (R. 1328, 1329, 1330).

As the District Court commented (R. 1306-1307), the activities of the engineers present were directed to closing the supply valve at the forward end of the #2 engine. This valve controlled the flow of oil from the main supply pipe to the engine and thence by way of fuel pumps through the pipes carrying the oil to the respective cylinders. Effort was being made to close this valve because the engineers present were certain that the leakage of fuel oil was from one of the connections on the top of the engine carrying oil to the cylinders (R. 954-955, 891). Naturally, the closing of this valve would have no effect on the leakage of oil from the main supply pipe which the respondent urged must have become fractured.

The District Court's review of the evidence of the engineers present when the fire broke out (R. 1306-1308, 1328-1330) discloses that while they did not see the fracture from which the oil was leaking (the top of the engine was above the level of their heads), they were certain that it was not the main supply pipe visible immediately above their heads; and they assumed, therefore, that it was one of the fuel lines on top of the engine.

Petitioners have said that there is no evidence that the main supply pipe was defective or in such condition as to present danger of leakage. The Circuit Court of Appeals commented that respondent's expert testimony showed (R. 1374) "that leaks sometimes occurred in pipes of this sort for no apparent reason—a pinhole might open up or a packing become leaky".

It will be noted that the Circuit Court of Appeals held that although the unseaworthiness of the #2 auxiliary

engine existing by reason of respondent's personal neglect made that engine so defective that it was apt to vibrate abnormally and become overheated, so that its condition presented a continuing danger of fracture of one of the fuel pipes leading fuel oil to the cylinders under high pressure and the ignition of oil spraying from the fracture by contact with the engine when overheated, it declined to draw the inference that the unseaworthiness of the engine caused the fire because, it said, the overhead main supply pipe might have become fractured, and might have permitted leakage of oil onto the engine.

Specifications of Error.

The United States Circuit Court of Appeals for the Second Circuit erred in the following particulars:

(1) In holding that the respondent was entitled to the exemptions of the Fire Statute notwithstanding the fire was caused by a defective engine, the defective condition of which created a fire hazard and resulted from respondent's personal negligence, because the petitioners did not prove that the fire could not have started in some way for which the respondent would not be liable.

(2) In construing the Fire Statute as precluding the inferences from established facts which would have been drawn in any case not arising under that statute.

(3) In holding that the respondent was entitled to the exemption of the Fire Statute although it was established that, whatever may have been the original cause of the fire, respondent's personal neglect contributed to the speed and intensity of the fire.

POINT I.

A vessel owner's liability for loss of cargo by fire is established by proof that unseaworthiness of the vessel existing by reason of its personal neglect created the danger of fire and that the fire could readily have resulted from the unseaworthiness, there being no evidence of any condition which could have caused the fire other than the unseaworthiness.

The discussion of cases appearing in the petition (at pp. 12-15) will not be repeated here.

In *Standard Oil Co. of N. Y.* v. *Pitcher Co.*, 289 Fed. 678 (C. C. A. 1), suit was against the owner of a gasoline filling station for damage resulting from fire alleged to have been caused by the generation of static electricity by reason of the defendant's failure to use a safety chain or device to ground any flow of static current. There was no direct evidence that the fire was thus caused and the defendant advanced the theory that the fire might have been started by sparks from locomotives operating on a nearby railroad or by sparks from the chimney of a nearby house, although there was no evidence of such sparks. The Circuit Court of Appeals for the First Circuit said (at p. 683):

> "It was not necessary that the plaintiff show that a static spark was actually produced; but it was sufficient if conditions and circumstances were shown from which the inference could be reasonably drawn that a static spark was produced."

The court pointed out that as the evidence furnished

> "ground for a reasonable inference that the gasoline vapor was ignited by an electric spark generated as

> claimed by the plaintiffs, it cannot be said that the jury were forced to base their conclusions upon inferences drawn from other inferences instead of proven facts" (at p. 683).

In *Brown* v. *Standard Oil Company of N. Y., et al.*, 247 Fed. 303 (C. C. A. 2), a tug and other property was destroyed as a result of fire in certain oily matter floating on the water in a slip near a sewer discharge. It was established that shortly before the fire a highly inflammable oily sludge was flushed into the sewer by respondent's employees. The respondent established that there were factories and garages which also discharged their waste into the same sewer and it contended that the oily matter on the surface of the water which ignited, might have come from them. It was held that as:

> "that sludge was inflammable; and that the flames burst out a very short time after it was flushed into the river—we cannot regard the finding of the District Judge that it was the sludge that burned as mere conjecture; * * *" (at p. 306).

The District Court had found:

> "I think that the testimony sufficiently shows the proximate cause of the fire was some substance which surrounded the tug and which caught fire from a means that is not exactly shown, but which should reasonably have been anticipated; * * *."

In dealing with this finding the Circuit Court of Appeals said (at p. 306):

> "We concur in his further finding that to flush the sludge into the river without foreseeing the danger of its being ignited was a want of ordinary and reasonable care."

In *Interlake Iron Corp.* v. *Gartland S. S. Co. (The Burlington)*, 121 F. (2d) 267 (C. C. A. 6), it was held that causal relation should be recognized:

> "whenever the thing done or omitted produces immediate danger of injury and is a substantial factor in bringing it about even though the precise result may not be foreseen. The test of proximity has been satisfied if a generally dangerous result was within the realm of expectability" (at p. 270).

POINT II.

Under the Fire Statute (46 U. S. C. 182) a vessel owner's liability for loss of cargo by fire is established by proof that unseaworthiness existing by reason of the vessel owner's personal neglect was causally related to the spread of the fire and its speed and intensity.

In dealing with the issue of respondent's liability, both the District Court and the Circuit Court of Appeals confined their discussion to the cause of the original outbreak of the fire and did not consider at all the reason for the rapid spread of the fire and its great intensity.

The fire hazard created by an accumulation of lubricating oil on the engine room tank tops and in the bilges has been mentioned in the petition (at p. 7). The District Court reviewed reports taken from the respondent's files and the testimony of respondent's superintending engineers whom it called as witnesses, establishing that for months there had been an abnormal leakage of lubricating oil from the crank cases of the main engines of the "Silverecypress", the loss on the last round voyage totaling some 6,000 gallons (R. 1315, 1318-1319). It pointed out that it was known before the vessel sailed on the

voyage on which the fire occurred, that this leakage resulted from defects in certain sealing bars designed to make the main engine crank cases oiltight (R. 1319, 1321), these defects permitting oil to leak out on the engine room tank tops and into the bilges (R. 1318); that only partial repairs were made on these bars before the last voyage commenced (R. 1319, 1321); that no repairs were made on them during the course of the last voyage (R. 1321); and that this defect existed by reason of respondent's personal neglect (R. 1313; Conclusion 2, 1341).

Both respondent's rules and the rules of the classification societies required that the engine room tank tops and bilges be kept free of oil because of the fire hazard presented by the presence of oil (Resp. Supt. Eng., R. 507, 574).

The abnormal loss of lubricating oil was a serious defect which the District Court found (R. 1313):

> "required specific attention by their (respondent's) accredited representative at Hongkong, and the indifference and inattention of Stephenson* and Cropley* is incredible."

The District Court reviewed the evidence establishing that a few seconds after the fire broke out around the #2 engine "the starboard bilge then caught fire" and that one of the engineers, in attempting to escape from the engine room, "crossed to the port side of the engine room to which the flames had then extended * * *" (R. 1307). As the engineers were working on the floor plates, the flames must have reached the port side of the engine room by running over the tank tops under the floor plates. If the vessel had been in normally safe condition there would have been nothing in the bilges and on the tank tops to burn.

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* Respondent's superintending engineers.

The Circuit Court of Appeals made but one comment in relation to the leakage of lubricating oil (R. 1371):

> "There was also evidence of an unusual loss of lubricating oil but that, too, indicated only a lack of engine repairs and mostly in respect to the main engines which were idle when the fire started."

Undoubtedly the leakage of lubricating oil upon the tank tops and into the bilges resulted from lack of repair of the main engines, but the District Court found that the disrepair of the main engines which permitted this leakage, resulted from respondent's personal neglect (R. 1313; Conclusion 2, R. 1341); and the Circuit Court of Appeals made no finding to the contrary.

The fact that the main engines were idle when the fire broke out does not, we submit, affect the relevancy of the defect we are discussing. The engine room tank tops and bilges were necessarily covered with oil as the result of the use of the main engines on the voyage from United States ports to Ilo Ilo: the main engines had been in use up to about 2:30 P. M. on January 12th, *i. e.*, some 13 hours before the fire broke out (R. 1029). Neither the District Court nor the Circuit Court of Appeals suggested that there was any evidence that the tank tops and bilges had been cleaned subsequent to the vessel's arrival: the evidence is in fact to the contrary. Respondent's witness, the second engineer, whose testimony the District Court characterized as a "myriad of conjectures and a labyrinth of contradictions" (R. 1305), testified that the tank tops were washed off with a hose every Saturday (R. 264). However, even if his testimony is accepted at face value, it does not indicate that the fire hazard was materially reduced, excepting, possibly, for a brief period on Saturday, since nothing was done to stop the continued leakage. The fire broke out on Wednesday.

Whatever may have been the initial cause of the outbreak of fire, the quantity of oil on the tank tops and in the bilges resulting from respondent's personal neglect, could not help but add to the extent and intensity of the fire.

In the petition (at pp. 16-17) we have quoted from the conclusion of the District Court that the libellants were not entitled to recover because they had not proved that the fire resulted "solely" from unseaworthiness. As that court found that the cause of the outbreak of the fire was not established, presumably it considered irrelevant the cause of the spread of the fire. Apparently, the Circuit Court of Appeals agreed with that conclusion.

Petitioners submit that respondent's liability is established if its personal neglect was causally related to the spread of the fire, whatever may have been the cause of its original outbreak.

Walker v. *Transp. Co.*, 3 Wallace 150, 153;
Hines v. *Butler*, 264 Fed. 986 (D. of Md.); 278 Fed. 877 (C. C. A. 4);
U. S. v. *Charbonnier*, 45 F. (2d) 174 (C. C. A. 4);
Christopher v. *Grueby*, 40 F. (2d) 8 (C. C. A. 1).

In *Hines* v. *Butler* (*supra*) the S. S. "Virginia" was destroyed by fire with heavy loss of life and cargo. The District Court found that the cause of the original outbreak of the fire was unknown (264 Fed. at p. 990). It stated that in relation to the rights of the cargo owners against the vessel owner, this was the issue presented: "Was the fire or the failure to extinguish it before harm was done the result of the negligence of the petitioners?" (at p. 988). It found that the sprinkler system on the vessel could not be used because of her owner's personal neglect and that "But for such negligence, the fire might have been extinguished before the cargo was destroyed. Consequently, section 4282 (the Fire Statute) does not

protect the petitioners against the claims of the owners of the lost merchandise" (at p. 996).

The Circuit Court of Appeals for the Fourth Circuit affirmed the judgment below. It found "that there was an entire lack of fire apparatus in proper condition to fight the fire" (278 Fed. at p. 878); and that as this condition resulted from the vessel owner's personal neglect, it was not entitled to the exemptions of the Fire Statute (at p. 880).

In *Christopher* v. *Grucby* (*supra*) it was held that the vessel involved was insufficiently equipped with fire extinguishers (40 F. (2d) at pp. 11, 12). The Circuit Court of Appeals for the First Circuit said (at p. 13):

> "Whether the fire was started by a spark from a wire, or by a spark from the uncovered generator brushes, or from the backfire of the engine, or from some other source, it can reasonably be found that the negligent situation, which the owners had created and/or suffered to exist in the engine room, and their failure to furnish adequate means 'ready for immediate use' for 'promptly and effectually extinguishing burning gasoline', one or both, were the cause of the loss of the ship, of the lives of twelve of the crew, and of the injury of three others."

The court found that the vessel owners were personally negligent in relation to the insufficiency of the fire extinguishers and the vessel owner's petition for limitation of liability was denied.

In *Walker* v. *Transp. Co.* (*supra*), this Court said that the Fire Statute "goes so far as to relieve the shipowner from liability for loss by fire, to which he has not contributed either by his own design or neglect" (3 Wallace at p. 153).

In *U. S.* v. *Charbonnier* (*supra*), the vessel owner was

held liable for the loss of the libellant's cargo by fire because the vessel owner's personal neglect "helped to bring about the catastrophe which took place" and "contributed as a proximate cause to the fire" (45 F. (2d) at p. 176).

POINT III.

The decision below that causal relationship between the unseaworthiness of the "Silvercypress" and the fire, was not established, was an error of law.

The conclusion of the lower courts that causal relationship between the fire and the unseaworthiness of the "Silvercypress" was not established is negatived by the actual facts found by both courts. The courts below concluded, erroneously, petitioners submit, that under the Fire Statute no inference of causal relationship can be drawn. The decision that causal relationship was not established was a conclusion of law. *Baumgartner v. United States*, ... U. S. ... (decided June 12, 1944).

CONCLUSION.

Petitioners respectfully submit that writs of certiorari should be granted to review the decision of the United States Circuit Court of Appeals for the Second Circuit because of the importance of the questions presented and because the decision in the present cases is directly contrary to the settled law of the First, Fourth and Sixth Circuits.

Respectfully submitted,

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Dated, New York, August 31, 1944.